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Addressing Nonsystematic Factors Contributing to the Underrepresentation of Minorities as Jurors

Elizabeth Neeley

The Sixth Amendment to the United States Constitution guarantees the right of criminal defendants to “a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” An “impartial jury” requires the jury be selected from a representative cross-section of the community. But how is a fair cross-section determined? In *Duren v. Missouri*, the Supreme Court outlined a three-pronged test defendants must satisfy to establish a prima facie violation of the fair-cross-section requirement:

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.¹

In her article, “Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded,” Paula Hannaford-Agor explains:

[w]ith few exceptions, the cases that have survived the hurdle of *Duren*’s [first and] second prong[s] ultimately fail because the underrepresentation was not the result of “systematic exclusion.” Courts have consistently held the Constitution cannot hold trial courts accountable for protecting the rights of defendants if they lack the ability to prevent or control the factors that undermine or interfere with those rights.²

For example, caselaw has established that when source lists used to compile master jury lists (especially voter-registration lists) significantly underrepresent minorities, it is not systematic exclusion for two reasons. First, unless those lists were created in a manner that constitutionally discriminates against

minorities they presumptively pass constitutional muster. Second, because courts have no authority to require underrepresented groups to register to vote or obtain a state driver’s license, their underrepresentation is not inherent to the jury-selection process, but rather is a result of self-exclusion. Hannaford-Agor argues:

By perpetuating the misconception that courts have no responsibility to address causes of underrepresentation other than those inherent in the system itself, caselaw has created a functional safe harbor in which courts can ignore substantial minority underrepresentation in their own jury pools as long as they can plausibly deny actively contributing to the problem.³

Hannaford-Agor argues that despite this lack of incentive created by caselaw, there are in fact many practices that courts can employ to address or mitigate the impact of nonsystematic factors. This article discusses one state’s work to both measure and address the extent to which nonsystematic factors have contributed to the underrepresentation of racial and ethnic minorities in the initial and eligible pools of jurors.

REFORM OF NEBRASKA’S JURY-COMPILATION PROCESS

In 2001, the Nebraska Supreme Court and the Nebraska State Bar Association established a joint task force to examine issues of racial and ethnic bias in the court system and legal profession.⁴ The 18-month investigation was released in 2003 and examined a broad range of topics.⁵ The primary recommendation of the report was to establish a standing committee to implement the recommendations of the report and to continually work to promote diversity in the judicial workforce and legal profession, ensure equal access to the justice system, and address racial disparities in the criminal and juvenile justice systems. Over the past nine years, a priority for the Nebraska Minority Justice Committee has been to examine

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Footnotes

1. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).
2. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded*, 59 DRAKE L. REV. 761, 763-64 (2011).
3. *Id.* at 764.

4. For information on state commissions and task forces charged with examining issues of racial and ethnic fairness in the courts visit the website for the National Consortium on Racial and Ethnic Fairness in the Courts at: <http://www.consortiumonline.net/>
5. THE NEBRASKA MINORITY JUSTICE TASK FORCE REPORT FINAL REPORT (2003), available online at: http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityandJusticeTaskForce/mjtf_final_report.pdf.

and improve the extent to which Nebraska's juries are representative of the communities that they serve.

REQUIRING PERIODIC JURY REFRESHMENT

During their study, the Task Force discovered that there was no statutory requirement for how often counties should update their jury-pool lists. Some counties, therefore, had not updated their jury-pool lists for several years (in some instances more than 15 years). Given the state's quickly changing demographics, this practice resulted in jury pools that were not representative of the communities that they served (excluding several groups of people including young adults, recent residents of Nebraska, and newly naturalized citizens).

To remedy this, LB 19 was passed in 2003, requiring all counties within Nebraska to refresh their jury-pool lists annually.⁶ The goal of LB 19 was to make jury pools across the state more representative of their communities. In 2005, the Nebraska Appleseed Center on Law in the Public Interest, together with the Minority Justice Committee, conducted a small-scale study to examine the impact that these bills had on the diversity of Nebraska's jury pools. Because baseline data were not available, perceptual data measuring the impact of the legislation were gathered through phone interviews with district court clerks. Prior to the law change, only 44 of Nebraska's 93 counties updated their master list on an annual or biannual basis. Researchers concluded that more than 25% of counties interviewed reported noticing either *great* or *some change* in the composition of the jury pool following annual updates, suggesting that the bill had its intended effect in a number of counties. Although not an intended impact of the legislation, annual or biannual updates also improved the efficiency of the jury-compilation process by updating resident addresses and removing individuals who have moved from the county (and are therefore ineligible) as well as county residents who are deceased.

EXAMINING THE JURY COMPILATION PROCESS: ESTABLISHING A NATIONAL MODEL

While the Committee counted its experience with jury refreshment as an early success, it was still inhibited from fully examining the extent to which juries are representative of their community because of a lack of data on the racial and ethnic composition of potential jurors, an issue affecting most jurisdictions. In Nebraska at this time, each county utilized its own distinctive juror-qualification form, and only a handful of Nebraska's 93 counties collected data on race and ethnicity. Because existing data were not available, Nebraska established its own process to allow it to examine and monitor the jury-compilation process.

In 2005 the Committee worked to pass LB 105, which authorized the Nebraska Supreme Court to adopt a uniform juror-qualification form and provided the Nebraska Supreme Court, or its designee, access to juror-qualification forms for the purpose of research. Accordingly, the Nebraska Minority Justice Committee worked on developing a uniform document that would continue to meet the needs of each county but would also allow for a confidential method of collecting demographic data. The Committee reviewed dozens of counties' juror-qualification forms, consulted Nebraska statutes regarding juror qualifications, and worked with a group of district court clerks and jury commissioners in developing the uniform juror-qualification form. The form was subsequently approved and adopted by the Nebraska Supreme Court and is currently being implemented in each county.⁷

In addition to the information required by statute and information added at the request of the district court clerks for practical administrative purposes, the qualification form collects data on the race and ethnicity of the potential juror. This information is collected on a page separate from the body of the juror-qualification form. The page containing the "confidential juror information" is removed from the qualification form, stored by the clerks until the end of the jury term, and then mailed to the Committee via the Nebraska Administrative Office of the Courts, along with lists of those ultimately selected for voir dire and those who served on the impaneled juries. The information gleaned from the uniform juror qualification form allows researchers to examine each stage of the jury-compilation process, from the compilation of the initial pool to the final impaneled jury, to determine whether and why the composition of the jury pools may or may not be reflective of the diversity of Nebraska's counties. To our knowledge, Nebraska is the first state to institutionalize a system to allow the continual monitoring of jury demographics throughout the compilation process.

EXPANDING JUROR SOURCE LISTS

State law had provided that master jury lists were comprised by combining the lists of registered voters and registered drivers in the state of Nebraska. There had been anecdotal concerns that because minorities may be less likely to be registered to vote or to drive, the source lists may not effectively achieve a representative master list. In December of 2008, the Committee released a study that confirmed these perceptions. Based on an examination of nearly 70,000 juror-qualification forms from eight of Nebraska's most diverse counties, data indicated that racial and ethnic minorities were significantly underrepresented in the initial and eligible pools of jurors.⁸ Addressing disparity in these initial stages is important

6. Because many of Nebraska's smaller counties may not even hold a jury trial over the course of a year, LB 712 was passed in 2010 to require counties with populations under 3,000 to refresh every five years, counties with populations between 3,000 and 7,000 to refresh every two years, and counties with populations over 7,000 to refresh annually.

7. Nebraska Supreme Court Rules Regarding the Use of Nebraska Juror Qualification Form (adopted December 14, 2005, effective

January 1, 2006), available online at: <http://court.nol.org/rules/amendments/Ch6Art10AppAAmds.pdf>.

8. ELIZABETH NEELEY, REPRESENTATIVE JURIES: EXAMINING THE INITIAL AND ELIGIBLE POOLS OF JURORS (2008) (Nebraska Minority Justice Committee), available at: http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityJusticeCommittee/Reports/Representative_Juries_Policy_Report_2008.pdf.

TABLE 1: 2008 RACIAL COMPOSITION OF DRIVER'S-LICENSE HOLDERS AND STATE-ID-CARD HOLDERS

RACE	DRIVER'S LICENSE	PERCENTAGE	ID CARD	PERCENTAGE
Asian	23,768	1.85%	3,284	4.26%
Black	47,626	3.71%	13,672	17.73%
Hispanic	3,068	0.24%	1,149	1.49%
Am. Indian	7,569	0.59%	2,352	3.05%
Other	50,354	3.92%	13,191	17.11%
Unknown	3	0.00%	2	0.00%
White	1,152,354	89.70%	43,461	56.36%
Total	1,284,742	100%	77,111	100%

because representative jury panels are necessarily dependent on the extent to which the initial and eligible juror pools are representative of the community.

The Committee explored several potential reforms to the compilation process and concluded that the most viable solution was to expand the source lists used to compile the master jury lists. The Committee explored the possibility of adding the following registries: state identification cards, tax rolls, unemployment, and those receiving state aid through the Department of Health and Human Services. In determining which, if any, of these lists would be appropriate, the Committee considered numerous factors including: whether the addition of the list would reduce the significant racial and ethnic differences documented in the initial jury pools; the costs involved in obtaining the list; the willingness of various agencies to provide the necessary data; the qualifications for being included on the potential list; and the level of duplication with the current source lists. Ultimately, the Committee recommended that through legislative action, the source lists used to create the master jury list should be expanded to include individuals with state identification cards.

State identification cards are issued through the Nebraska Department of Motor Vehicles.⁹ As of October 2008, the total number of individuals with state identification cards (but not drivers' licenses) was 77,111. To obtain a state identification card, Nebraska law indicates that applicants need only provide "proof of date of birth and identity with documents containing a photograph or with nonphoto identity documents which include his or her full legal name and date of birth."¹⁰

The Department of Motor Vehicles provided a county breakdown by race and ethnicity of individuals over the age of 18 with state identification cards. The table above indicates that nonwhites (Asians, Blacks, Hispanics,¹¹ and American Indians) comprise a much greater percentage of state-identification-card holders than of registered drivers.

Based on data indicating the significant underrepresentation of certain minority groups, and the above statistics regarding state identification cards, a bill was drafted adding state-identification-card holders as a source list for compiling juries. On May 29, 2009, the Governor signed the bill, LB 35, into law.

MEASURING THE IMPACT OF LB 35

Since the law change, the Committee has measured the extent to which this legislative change has resulted in juries that are more representative of the communities that they serve. Relying on the methods used in its original examination,¹² the analysis compares the demographics of the county population to the demographics of the initial and eligible pools of jurors. The county population is based on U.S. Census data, which excludes individuals under the age of 19 and noncitizens (who are ineligible for jury service). The initial pool of jurors includes individuals who have received and returned a juror-qualification form. The eligible pool of jurors includes those who remain in the pool after individuals are removed for statutory eligibility criteria or disqualification, and those who opt out for jury service.

Chi-square analyses were conducted to determine whether the county's demographics were significantly different from the demographics of the county's initial jury pools and eligible pools. A chi-square test takes an expected proportion (in this case, the proportion of each racial and ethnic group) and compares it to an observed proportion (in this case, the observed racial and ethnic proportions in the initial and eligible pools). The chi-square test indicates whether the difference between the groups is statistically significant. A standardized residual over 2.0 indicates that the disparity contributes to the significant chi-square value; the greater the standardized residual, the greater the disparity.

Given the space limitations of this article, the results discussed below are limited to Douglas County (Omaha), Nebraska's largest county. Prior to the law change, Whites and Asians were significantly overrepresented in the initial pools of jurors while Blacks and Hispanics were significantly underrepresented in the initial pools of jurors (see Table 2). Following the law change, Blacks are no longer significantly underrepresented in the initial pool (the standardized residual indicating significant disparity dropped from 16.1 to 1.8), and Whites are no longer significantly overrepresented in the initial pool (the standardized residual dropped from 5.8 to 1.1). While significant disparities still remain for Asians and Hispanics, the extent of the disparity, as measured by the standardized resid-

9. Neb. Rev. St. § 60-4,181.

10. Neb. Rev. Stat. § 60-484 (f)(i).

11. Please note that the Nebraska Department of Motor Vehicles only began collecting information on Hispanics in 2008. For this rea-

son, the number of Hispanics is drastically lower than expected. It is likely that a large percentage of Hispanic drivers were captured in the "other" category prior to the policy change.

12. See NEELEY, *supra* note 8.

TABLE 2: DOUGLAS COUNTY INITIAL AND ELIGIBLE POOLS OF JURORS PRE- AND POST-LAW CHANGE

COMPARISON TO THE INITIAL POOL					
	WHITE	BLACK	ASIAN	AMERICAN INDIAN	HISPANIC
COUNTY POP	83.7%	10.4%	1.5%	0.6%	3.9%
INITIAL POOL (PRE-LAW CHANGE)	86.8%	7.4%	2.3%	0.6%	3.0%
INITIAL POOL (POST-LAW CHANGE)	84.8%	9.8%	2.0%	0.6%	2.9%
LEVEL OF DISPARITY (PRE-LAW CHANGE) (STANDARDIZED RESIDUAL)	5.8	16.1	11.3	0.5	8.0
LEVEL OF DISPARITY (POST-LAW CHANGE) (STANDARDIZED RESIDUAL)	1.1	1.8	3.8	0.5	4.6
COMPARISON TO THE ELIGIBLE POOL					
COUNTY POP	83.7%	10.4%	1.5%	0.6%	3.9%
ELIGIBLE POOL (PRE-LAW CHANGE)	87.1%	7.7%	1.9%	0.6%	2.7%
ELIGIBLE POOL (POST-LAW CHANGE)	86.1%	10.1%	1.5%	0.5%	1.7%
LEVEL OF DISPARITY (PRE-LAW CHANGE) (STANDARDIZED RESIDUAL)	4.4	9.7	3.4	0.6	7.2
LEVEL OF DISPARITY (POST-LAW CHANGE) (STANDARDIZED RESIDUAL)	2.0	0.7	0.1	0.7	8.2

ual, has greatly decreased (from 11.3 to 3.8 for Asians and from 8.0 to 4.6 for Hispanics).

In regards to the eligible pool of jurors, prior to the law change, Whites and Asians were significantly overrepresented in the eligible pools of jurors while Blacks and Hispanics were significantly underrepresented in the eligible pools of jurors. Following the law change, Blacks are no longer significantly underrepresented in the eligible pool (the standardized residual dropped from 9.7 to 0.7) and Whites and Asians are no longer significantly overrepresented in the eligible pool (the standardized residual dropped from 4.4 to 2.0 for Whites and from 3.4 to 0.1 for Asians). However, significant disparities still remain for the Hispanic population.

The other counties examined exhibited similar trends; the addition of state-identification-card holders has significantly improved the representation of Blacks and, in certain populations, American Indians in Nebraska's initial and eligible juror pools. The addition of state-identification-card holders has also improved the representation of Hispanics in the initial pool of jurors, but has not improved representation in the eligible pools. To further examine this finding, the Committee conducted an analysis of eligibility criteria by race.

Jurors from the initial pool can become ineligible for three reasons:¹³ (1) They do not meet the juror requirements (not a U.S. citizen; not a county resident; do not read, speak, or understand English; not over 18 years of age); (2) they are disqualified (they are a sheriff, jailer, deputy, clerk, or judge; they are a party to a pending case; or they have a criminal offense which

disqualifies them); or (3) they opt out (over 65 years of age, nursing mother, active military, or recent prior jury service).

Ineligibility rates differ by race and ethnicity (see Table 3). Blacks (31.6%) and American Indians (32.8%) have comparable rates of ineligibility to Whites (31.1%), meaning that they are as likely as Whites to be eligible for jury service. By improving their representation in the initial pool of jurors, their representation on the eligible pools of jurors has also improved. Asians (58.3%) and Hispanics (52.3%), on the other hand, have substantially higher rates of ineligibility. Put another way, more than half of all Asians and Hispanics who are called for jury service are not eligible to serve. One notable difference is that across the counties examined, Asians tend to be overrepresented in the initial pool of jurors, and Hispanics are not (when Hispanics are underrepresented in the initial pool, the extent to which they are underrepresented in the eligible pool is compounded).

Table 4 provides, by race, the reasons why individuals become "ineligible" for jury service. When we look at the reasons why Asians and Hispanics are ineligible for jury service, data indicate that they are less likely to meet two of the primary requirements—not a U.S. citizen and do not read, speak, or understand English. Whites on the other hand, primarily become ineligible for jury service because they opt out (particularly in the category of being over the age of 65). Ineligibility reasons for Blacks fall into two categories: not a U.S. citizen (Nebraska has a large population of refugees from African Nations) and opted out as being over the age of 65. For

TABLE 3: INELIGIBILITY BY RACE

WHITES	BLACKS	ASIANS	AM. INDIANS	HISPANIC
31.1%	31.6%	58.3%	32.8%	52.3%

13. Neb. Rev. Stat. § 25-1601.

TABLE 4: RACIAL BREAKDOWN OF REASONS FOR INELIGIBILITY

	WHITES	BLACKS	ASIANS	AM. INDIANS	HISPANIC
REQUIREMENTS	21.5%	44.9%	88.4%	26.6%	84.5%
DISQUALIFIED	6.9%	13.9%	1.3%	22.4%	2.7%
OPTED OUT	71.6%	41.3%	10.3%	51.0%	12.8%

American Indians, the majority of those ineligible for jury service opted out (specifically, being over the age of 65 or having an impairment).

In examining why Hispanics remain underrepresented in the eligible pools of jurors, several explanations are possible. First, as described above, Hispanics are significantly underrepresented in the initial pools of jurors, and the addition of state-identification-card lists has not adequately raised their representation in the initial pool. Second, it is possible that the population of Hispanics who do not return a juror-qualification form is growing. Third, it is possible that the population of ineligible Hispanics in the state is growing. Finally, anecdotal concerns have been expressed by jury commissioners about the number of Hispanics claiming an inability to read, speak, or understand English (particularly in situations where those individuals are known in the community to possess English skills).

These reports beg the question of whether the requirement for English is being utilized as a convenient way for Hispanics to “opt out” of jury service.¹⁴ At a minimum, these reports have signaled the need for a process to determine English proficiency—in some counties, anyone who indicates on the juror qualification form that they do not read, speak or understand English is presumptively removed from consideration; in other counties, judges or jury commissioners make these determinations on a case-by-case basis, albeit with no formal criteria. The Committee will continue to monitor the representation of the Hispanic population and has partnered with the Latino American Commission to provide statewide education on the importance of jury service.

CONCLUSION

While other jurisdictions may not face the same barriers regarding periodic refreshment, measurement, or limited juror-source lists, Nebraska’s experience of court-led reform demonstrates that courts can in fact develop policy and employ practices to reduce or mitigate the impact of nonsystematic factors that result in the underrepresentation of minorities. Moreover, the strategy of data-driven jury reform can be applied to other types of nonsystematic exclusion.

For example, jurisdictions could re-evaluate the eligibility criteria set forth to qualify someone as eligible for jury service.

In Nebraska a person who has been convicted of a criminal offense punishable by imprisonment in a correctional facility (which is highly correlated with race) when the conviction has not been set aside or pardoned is not eligible for jury service,¹⁵ while in New Mexico a person who was convicted of a felony and who met all other requirements for eligibility could be summoned for jury service if the person had successfully completed all conditions of the sentence imposed for the felony, including conditions for probation or parole.¹⁶ Moreover, a large percentage of Hispanics and Asians in Nebraska are ineligible for jury service because they do not “read, speak, or understand English.”¹⁷ In New Mexico, however, language ability is not a criterion to determine eligibility for jury service¹⁸ and, in fact, court interpreters are provided to jurors with limited English ability. Jurisdictions could also re-evaluate the informal and subjective processes by which eligibility determinations are made (see discussion above regarding the need to develop an objective and uniform way of determining language ability).

Another potential area of inquiry is the extent to which minorities are overrepresented in the pool of individuals with undeliverable summonses (local migration rates are highly correlated with socioeconomic status, which in turn is related to minority status) and whether increased efforts to reduce incorrect address information will yield more representative pools. For example, the National Center for State Courts recommends that before summoning prospective jurors, staff verify and correct their addresses using the National Change of Address (NCOA) database available through the U.S. Postal Service.¹⁹ States with county-based systems will likely find that the efforts and practices in place to deliver summonses initially returned for inaccurate address information will differ greatly from county to county.

Efforts can also be taken to reduce failure to appear for jury service. Research in other contexts suggests that failure-to-appear rates are higher for racial and ethnic minorities than they are for Whites.²⁰ The National Center for State Courts recommends that a timely second summons or notice typically reduces the nonresponse or failure-to-appear rate by 24% to 46%.²¹ Research by the University of Nebraska Public Policy Center indicates that providing information about what would

14. While the numbers of Asians who are ineligible for jury service for not being a citizen and for language ability are nearly identical, the number of Hispanics who are ineligible for jury service for language reasons is about 10% higher than the number who are ineligible for citizenship reasons.

15. Neb. Rev. Stat. § 25-1601.

16. N.M. Stat. Ann. § 38-5-1.

17. See text at notes 13-14 *supra*.

18. N.M. Stat. Ann. § 38-5-1.

19. The National Center for State Courts’ Center for Jury Studies maintains an online resource, *Best Practices in Jury System Management*, which is available at <http://www.ncsc.org/services-and-experts/areas-of-expertise/jury-management.aspx>.

20. Brian Bornstein, Alan Tomkins & Elizabeth Neeley, *Reducing Courts’ Failure to Appear Rate: A Procedural Justice Approach* (2010) (United States Department of Justice. Office of Justice Programs. National Institute of Justice, 2008-IJ-CX-0022).

21. See *Best Practices*, *supra* note 19.

happen if a misdemeanor defendant failed to appear (i.e., possible sanctions) significantly decreases failure-to-appear rates. Given research by the American Judicature Society indicating that the single biggest predictor of nonresponse rates to jury summonses is the jurors' expectations about what would happen if they failed to appear,²² it is likely that the threat of sanctions on the initial summons would also increase response rates, particularly for minority populations.

Given the diversity of statutory frameworks and formal and informal juror-compilation processes, it is likely nonsystematic exclusion factors can continue to be identified and addressed to produce more representative juries. Progress, however, is dependent on judicial leadership to examine and address these issues and research partnerships to effectively determine the direction and impact of reforms.



Elizabeth Neeley, Ph.D., is the director of Nebraska's Minority Justice Committee, a joint initiative of the Nebraska Supreme Court and Nebraska State Bar Association, established to address issues of racial and ethnic fairness in the justice system. Dr. Neeley is a member of the American Bar Association and the National Legal Aid and Defender Association. She serves on the Board of Directors of the National Consortium on Racial and Ethnic Fairness in the Courts and on the Editorial Board of Court Review. Dr. Neeley is a Faculty Fellow for the University of Nebraska Public Policy Center. She is an active member of the Nebraska Supreme Court's Interpreter Advisory Committee and the Nebraska Crime Commission's Committee on Disproportionate Minority Contact.

22. ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS (1998).

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